SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 621

IN THE MATTER OF

FERRO CONTRACTING CO., INC.,

Bankrupt.

CARL F. BARBATO, as Trustee in Bankruptcy of FERRO CONTRACTING CO., INC., Bankrupt,

Petitioner,

vs.

LIVINGSTON NATIONAL BANK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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Statement of Facts

On June 19, 1963, Ferro Contracting Co., Inc. (hereinafter referred to as the Bankrupt), a New Jersey corporation, borrowed $32,325.00 from the Livingston National Bank (hereinafter referred to as the Bank). As security for the loan, the President of the Bankrupt executed a chattel mortgage-security agreement on five pieces of construction equipment owned by the Bankrupt. This agreement covered a Michigan front end loader, three crawler tractor bulldozers and a backhoe. The Bank filed a Financing Statement with the Secretary of State of New Jersey pursuant to the provisions of the Uniform Commercial Code, N.J.S.A. 12A:9-401.

The Bankrupt filed its petition for Bankruptcy on September 10, 1964; on November 5, 1964 public sale was held and the equipment was sold subject to proof by the Bank of its lien on the equipment. The Trustee challenged the validity of the Bank's lien on the ground, *inter alia*, that the lien was invalid because the equipment were "motor vehicles" within the meaning of N.J.S.A. 39:1-1 *et seq.* and the Bank failed to perfect its lien in accordance with the requirements of N.J.S.A. 39:10-11 C as required for motor vehicles in said Act.

The Referee found that the items involved were not "vehicles" within the meaning of the Motor Vehicle Act of the State of New Jersey, N.J.S.A. 39:1-1 *et seq.* but were pieces of construction equipment or chattels, and therefore, the Bank's lien was properly perfected by filing with the office of the Secretary of State in accordance with the provisions of the Uniform Commercial Code, N.J.S.A. 12A:9-401 (1)(c).

The District Court, on Petition for Review, held that the items were "motor vehicles" within the meaning of the New Jersey Motor Vehicle Act and that the Bank had not

perfected its lien because it failed to file the Financing Statement with the Director of Motor Vehicles in accordance with the provisions of N.J.S.A. 39:10-11 C.

The Court of Appeals for the Third Circuit reversed the District Court, holding that the equipment involved did not fall within the definition of "motor vehicle" as used in the Certificate of Ownership Law, N.J.S.A. 39:10-11 C, and that the Bank had perfected its lien by filing pursuant to the provisions of the Uniform Commercial Code.

After the filing of the opinion the Trustee filed a Petition for Rehearing which was denied. The Trustee now petitions for a Writ of Certiorari.

The Petition for a Writ of Certiorari Should Be Denied

The Court of Appeals stated that the controlling issue in this litigation is whether the five items involved fall within the category of "motor vehicles" as used in the New Jersey Certificate of Ownership Law. The Trustee contends in his Petition that the Court of Appeals decided an important question of New Jersey law in such a way as to conflict with the applicable law of the State.

It is clear that the New Jersey law is in complete accord with the Court of Appeals decision. The Court of Appeals noted that the Certificate of Ownership Law did not contain a definition of "motor vehicle" at the time of the transaction here involved. Accordingly, the definition of "motor vehicle" as used in the comprehensive New Jersey Motor Vehicle Act, N.J.S.A. 39:1-1, becomes of prime importance. The Trustee in his Brief in the Court of Appeals recognized that the definition of "motor vehicle" under N.J.S.A. 39:1-1 was important and stated the question involved as follows:

> "1. Did the District Court err in holding that the chattels in issue are 'motor vehicles' within the intent of N.J.S.A. 39:1-1 and 39:10-21?"

No New Jersey case involving the definition of "motor vehicle" has been found which held that construction equipment is included within the definitional provisions of the Motor Vehicle Act. In fact, in two recent New Jersey Supreme Court decisions decided subsequent to the decision by Judge Seitz herein, the Court expressly stated that the Legislature did not intend construction equipment to be included within the definition of Motor Vehicle as found in N.J.S.A. 39:1-1. See, *National State Bank* v. *Rapp*, 90 N. J. Super. 300, 217 A. 2d 325 (1966), certif. granted 47 N. J. 91, 219 A. 2d 425 (1966), rev. 49 N. J. 457, 231 A. 2d 222 (1967) and *Ferrante Equipment Company* v. *Foley Machinery Co.*, 49 N. J. 432, 231 A. 2d 208 (1967). In the *Ferrante* decision, the Court held (49 N. J. 432, 438, 231 A. 2d 208, 211):

> "As stated above, this decision rests upon whether the bulldozer is a motor vehicle within the contemplation of the Garage Keepers Lien Act. For, if it is a motor vehicle, defendant has only a garage keeper's lien that is inferior to plaintiff's. If it is not a motor vehicle, defendant has an artisan's lien that is superior to plaintiff's. But, no definition of a 'motor vehicle' accompanies the Garage Keepers Lien Act. Under N.J.S.A. 39:1-1 a 'vehicle" is defined to include "every device in, upon or by which a person or property is or may be transported upon a highway.' It also defines a 'motor vehicle' to include 'all vehicles propelled otherwise than by muscular power, excepting such vehicles as run upon rails or tracks.'
>
> "We are convinced that the Legislature meant to include by the term 'motor vehicle' only those self-propelled vehicles which are used on a highway primarily for purposes of transporting persons and property from place to place, e.g., automobiles,

trucks, and buses. As a bulldozer is used primarily for excavation and building purposes and only incidentally to transport persons or property from place to place, it should not be included in such a definition. See, In the Matter of Ferro Contracting Co., Inc., —— F. 2d —— (3 Cir. 1967).

"That a bulldozer is not a motor vehicle within the contemplation of the garageman's lien act is strengthened by administrative interpretation of the motor vehicle certificate of ownership law. N.J.S.A. 39:10-1 et seq."

In both cases the Court went on to expressly hold that bulldozers could not therefore be considered "motor vehicles" within the contemplation of the Garage Keepers Lien Act, N.J.S.A. 2A:44-20 *et seq.*

In addition to these two recent New Jersey Supreme Court decisions, three cases decided by lower New Jersey courts have indicated that construction equipment similar to that involved in this litigation were not intended to fall within the definitional terms of "motor vehicle" as contained in the New Jersey Motor Vehicle Act. Thus, in *Bogota* v. *Brewster Equip. Co.*, 83 N. J. Super. 586, 200 A. 2d 629 (App. Div. 1964), where the plaintiff sought to add as property tax assessables a considerable amount of construction equipment owned by the defendant but not originally included as property subject to the Borough's personal property tax, the Court indicated that "motor vehicle" as used in N.J.S.A. 39:1-1 does not include construction equipment.

Also, in *Wood* v. *Food Fair Stores, Inc.*, 49 N. J. Super. 352, 139 A. 2d 805 (Law Div. 1958), the Court recognized that a "backhoe" or trench digger was not a vehicle which requires registration, does not operate on the highway because of its metal treads, and is moved from job to job on

a flat-top trailer, and in *Wilson* v. *Robert A. Stretch, Inc.*, 44 N. J. Super. 52, 129 A. 2d 599 (Ch. Div. 1957), the Court ruled that a front end loader with one cubic yard bucket and blade was not a "vehicle" for purposes of the Municipal Mechanics Lien Act, N.J.S.A. 2A:44-128.

In view of all these decisions, it is clear that the decision of the Court of Appeals does not conflict in any way with the case law of the State of New Jersey.

While the Petitioner bases much of his agreement upon the Statement annexed to the Amendment to the original Certificate of Ownership Law, this Statement is consistent with the decision below that the Legislature was doing no more than making clear the pre-existing legislative intent as to the scope of the statute. Indeed, the Court of Appeals decision is strengthened by the fact that the statute was drafted by the Chief of the Certificate of Ownership Bureau of New Jersey who testified on behalf of the Bank before the Referee that there had been considerable administrative confusion as to the coverage of the term "motor vehicle" and that the items involved were not the type of equipment generally titled and registered in New Jersey.

It is thus apparent that the Court of Appeals decision in this case is in accord with New Jersey law in all respects. Moreover, while the particular issue is of importance to the parties, this case clearly does not involve a principle of law which raises a question of general public interest or importance. The Amendment to the New Jersey Certificate of Ownership Law passed after this dispute arose provides for "non-conventional type motor vehicles" and has effectively cleared up any question which might have arisen in the future. This Court should not grant a review of a case which involves no general public principle requiring pronouncement.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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